Supreme Court, U. S.
FILED
AUG 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1775

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT G. BENSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1775

ROBERT G. BENSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former officer in the regular Air Force, was involuntarily retired in 1971 as a major. He contends that he should be returned to active duty as a lieutenant colonel.

1. In February 1943, petitioner, then 18, entered the Armed Forces. On March 12, 1944, he was commissioned as a second lieutenant in the Army Air Corps. He became 21 on May 18, 1945, after 14 months of commissioned service. He was released from active duty to the reserve six months and ten days after his 21st birthday.

Petitioner was recalled to active duty in April 1951. On October 15, 1952, he accepted an appointment as a second lieutenant in the regular Air Force. He remained on active duty until his involuntary retirement in October 1971,

after having twice been passed over for promotion to the rank of lieutenant colonel.

In 1973 petitioner filed this suit in the United States District Court for the District of Colorado seeking an order requiring his retroactive promotion to the permanent grade of lieutenant colonel and his recall to active duty. He claimed that he would have been considered for promotion to major prior to 1962, and thus would have been more favorably considered by subsequent promotion boards, if (1) the Air Force had not, in computing his promotion list service date ("PLSD") erroneously failed between November 1956 and January 1961 to credit him with the six months and ten days of active commissioned duty he served between his 21st birthday and his release in 1945; and (2) Congress had not denied him equal protection of the law by providing in Section 207 of the Armed Forces Regular Officer Augmentation Act of 1956, 70 Stat. 586, now 10 U.S.C. 8287 (a)(1), that active commissioned service prior to the age of 21 may not be credited in determining grade, position on promotion lists, or seniority in grade.

After trial, the district court found that petitioner had failed to prove any damages from the erroneous entry of the PLSD date in his service record and that 10 U.S.C. 8287 had a rational basis for not accrediting active commissioned duty served prior to the age of 21 (Pet. App. 9a-10a). The court of appeals affirmed (Pet. App. 1a-7a).

2. Petitioner's contention that he was denied promotion due to the error in his PLSD date presents no general issue of public importance and is, in any event, without merit. Petitioner claims that but for that error, he would have been considered for promotion in 1961 rather than 1962. But in 1961, petitioner, then a captain, would

have been eligible for temporary promotion only from the so-called "secondary zone," which is "a means whereby exceptionally well qualified officers with less service than those in the primary zone may be promoted before their contemporaries. * * *" Section 9e(b), Air Force Reg. No. 36-89 (June 10, 1960). No officer is entitled to such advancement, and no officer suffers prejudice from not having received it. Furthermore, such a "temporary promotion has no effect upon an officer's permanent grade, * * *." Section 3, Air Force Reg. No. 36-89, *supra*.

Petitioner's suggestion that, but for the subsequently corrected error in his PLSD date, he would have received early temporary promotion in 1961 is unsupported speculation. The argument was considered and rejected by the body created to review such claims, the Air Force Board for the Correction of Military Records (Pet. App. 7a). In denying relief, the courts below properly observed the limitations on judicial review of matters pertaining to the promotion of officers in the armed forces. See, *e.g.*, *Brenner* v. *United States*, 202 Ct. Cl. 678, certiorari denied, 419 U.S. 831; *Boyd* v. *United States*, 207 Ct. Cl. 1, certiorari denied, 424 U.S. 911.

3. Petitioner's claim that 10 U.S.C. 8287(a) unconstitutionally discriminates against World War II officers with commissioned service prior to the age of 21 also is without merit. The Officer Personnel Act of 1947, which became effective December 31, 1947, provided in Section 506(c), 61 Stat. 890, that henceforth commissions in the Regular Army would be granted only to persons 21 years of age or over. The Act made no provision for the accreditation to regular officers appointed after its effective date of commissioned

service in World War II.[1] This provision was effective and applicable to the Air Force when petitioner accepted his commission as a regular officer in 1952. In the Armed Forces Regular Officer Augmentation Act of 1956, 70 Stat. 584-585, now 10 U.S.C. 8287(a),[2] Congress provided accreditation for such service in World War II, after the age of 21. See S. Rep. No. 2420, 84th Cong., 2d Sess., p. 8 (1956). Congress thereby sought to ensure that regular officers appointed after 1947, but who had been commissioned prior to the age of 21 during World War II, did not enjoy any

---

[1]Section 506(b) and (c) of the 1947 Act provided:

> (b) All persons appointed officers in the Regular Army pursuant to this section shall be citizens of the United States, at least twenty-one years of age, of good moral character, physically qualified for active military service, and shall have such other qualifications as may be prescribed by the Secretary of War.
>
> (c) For the purpose of determining grade, position on promotion list, permanent grade seniority, and eligibility for promotion, each person initially appointed and commissioned an officer in the Regular Army shall, at time of appointment, be credited with an amount of service equivalent to the total period of active Federal service performed after attaining the age of twenty-one years as a commissioned officer in the Army of the United States or any component thereof subsequent to December 31, 1947, and prior to such appointment, but in no event shall any person be credited for such purposes with more than five years of such service. * * *

[2]10 U.S.C. 8287(a) provides in pertinent part:

> For the purpose of determining grade, position on a promotion list, seniority in his grade in the Regular Air Force, and eligibility for promotion, a person originally appointed in a commissioned grade in the Regular Air Force, other than a person appointed with a view to designation as a medical or dental officer or as an Air Force nurse or medical specialist, shall be credited, at the time of his appointment—
>
> (1) with the active commissioned service in the armed forces that he performed after becoming 21 years of age and before his appointment.

special advantage in the competition for promotion because of their service prior to the age of 21. Since Congress necessarily must have very broad latitude in matters relating to the seniority of professional military officers, and the classification has a rational basis, the statute is valid. *Johnson* v. *Robison*, 415 U.S. 361.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.